No. 62

UNITED STATES

Circuit Court of Appeals.

October Term, 1892.

TYLER MINING COMPANY,
Plaintiff in Error,

vs.

CHARLES SWEENEY, *et al.*,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

JNO. R. McBRIDE,
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Solicitors for Plaintiff in Error.

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STATEMENT OF THE CASE.

This is an action at law to recover the possession of certain premises known as the Tyler Mine, situated in Yreka Mining District, Shoshone County, State of Idaho.

The plaintiff, the Tyler Mining Company, is the owner of a mining claim located under the Mineral Land Laws of the United States, and the defendant, the Last Chance Mining Company is the owner of an adjoining claim held and owned by like tenure, while the defendants, the Republican and Idaho Mining Companies, respectively, claim to own certain premises adjoining each of the other locators. The relative situation of these different claims will be better understood by an inspection of the annexed diagram:

The plaintiff alleged in its complaint, as its cause of action that the plaintiff owned a mining location in which a large lode or vein of rock in place bearing silver and lead exists in said Tyler claim; that on its strike or course said lode passes lengthwise through said claim, cutting the end lines thereof, and that the top or apex of the lode is inside the surface lines of the claim. That the lode in its downward course departs from the perpendicular at an angle of about forty degrees from the horizontal, said inclination being in a southerly direction, and that the lode extends to a great depth, and that by reason of its departure from a perpendicular course said lode or vein extends at a depth far outside and south of the southerly side line of said Tyler claim at the surface. That the defendants unlawfully entered upon that portion of said Tyler lode which lies outside of said southerly side line at depth, and took possession thereof ousting and ejecting plaintiff therefrom, and took ores from said Tyler lode to the value of Two Hundred Thousand Dollars, and have ever since the month of June, 1891, withheld said premises from the plaintiff.

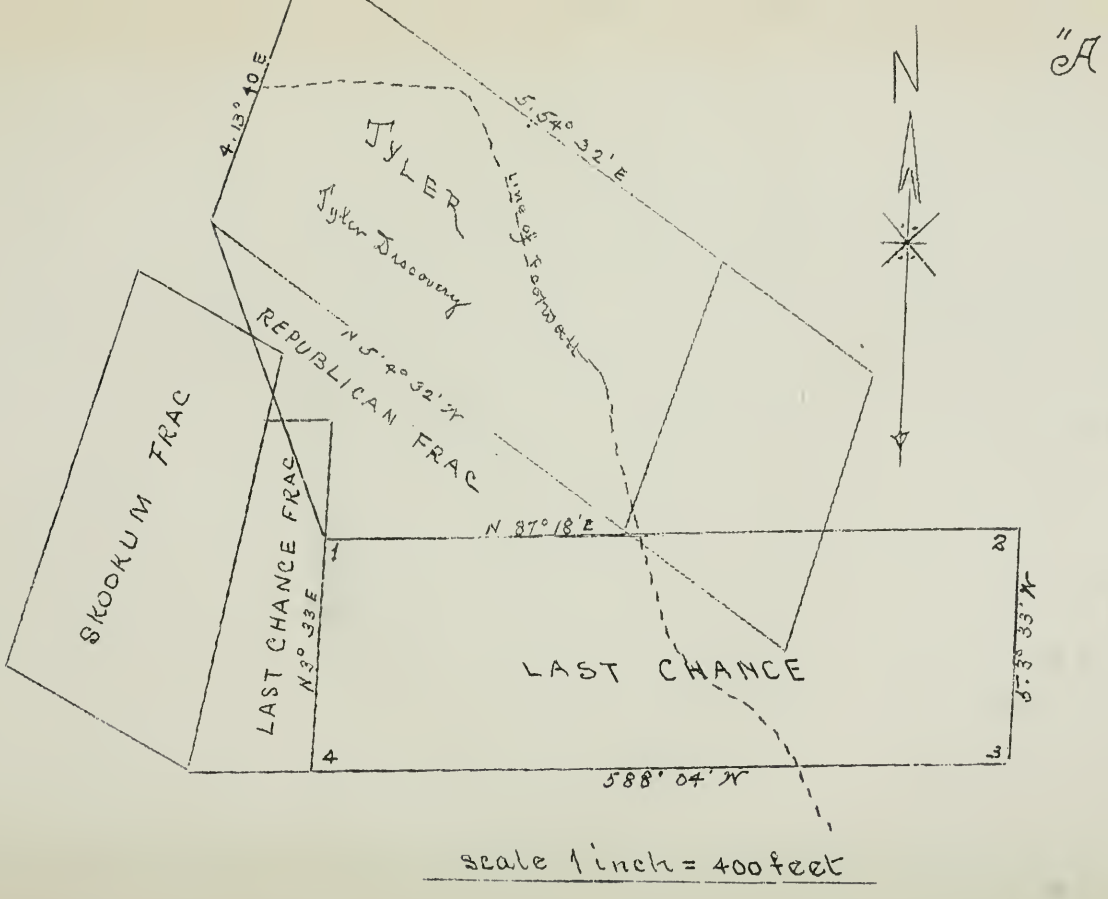
The prayer of the complaint is for the recovery of the possession of the Tyler lode, or so much thereof as is alleged to be withheld, and for damages, etc.

The action is against the defendants Charles Sweeney, Frank R. Moore, individuals, the Last Chance Mining Company, the Republican Mining Company, and the Idaho Mining Company, each corporations. The other defendants, Hanley, Quackenbush, Ross, Pressly and Hyatt, were employees of the other defendants, while Moore and Sweeney are, respectively, the first, the president of each of the corporations, and Sweeney the superintendent of the mining operations.

A disclaimer of any personal interest is filed by Moore and Sweeney. Some of the other individuals sued as defendants also disclaimed any interest, but as no judgment was returned against them they require no mention in this appeal.

The facts developed at the trial, are substantially as follows:

"A"



scale 1 inch = 400 feet

The notice of location of the Tyler claim was dated and posted on the claim on the 21st day of September, 1885, and proof was made of the discovery of the lode, the marking of the boundaries, the posting of the notice and filing for record, and recording. The Last Chance claim, according to the proofs admitted, was located on the 19th day of September, 1885; its notice in proof being that date. The Republican fraction claim, being in the space or angle formed by the surface lines of the Tyler and the Last Chance, was located on the day of April, 1886, and the Skookum fraction and Idaho fraction locations were made long after either of the others.

On April 19th, 1887, the owners of the Tyler claim made a survey and application for a patent in the United States Land Office of the proper District, and the application seems to have been in the ordinary form for 1500 feet in length by 600 feet in width, as described in the field notes and survey. To this application the owners of the Last Chance location filed an adverse claim, in which they set up that they were the owners of a small triangular piece of ground, which is described and which is indicated on the maps as being in the southeast corner of the Tyler, as surveyed for patent, and extending along its southerly side line a distance of about 427 feet, including altogether an area of a little over an acre of ground. In support of this adverse claim a suit was brought in the District Court of Shoshone County, the plaintiffs in that case being the Last Chance Mining Company, one of the defendants in this action.

Their prior location was averred, and by defendant's answer issue taken on all the questions involving the right of the plaintiffs therein to the ground. Two efforts to try the case resulted in no verdict, and in 1890, at the June Term of the Court, the defendant withdrew its answer in the action in open Court, and appeared no further in the case. No costs were taxed against it. The plaintiff in that suit then made such proof, that the Court found it to be the prior locator of and entitled to the ground in controversy and entered its judgment accordingly. The proceedings in that action were read in evidence at the trial of this suit against the objection of the plaintiff as to their competency

and relevancy. After the Tyler Company had withdrawn its answer it abandoned 427 feet of the east end of its original claim, and there being no other contest to its application for patent in the United States Land Office, it entered the remainder of the claim and received from the Receiver of the Land Office a duplicate receipt showing the entry. The Tyler claim as described in the complaint is the location thus entered. The defendant, Last Chance Company, also after the above proceedings in Court, made application for patent including the piece formerly in dispute, and before the trial in this action, had made entry of its claim as shown on the map, and the receipt of the Land Office, showing such entry was admitted in evidence.

The larger portion of the evidence introduced at the trial was addressed to establishing the course, dip, continuity and character of the lode.

The course of the lode was practically conceded by all the witnesses to be about North 50° to 55° west, the dip in the works to be about from 35° to 45° from a horizontal. The width of the lode, and its character were the subjects upon which the witnesses most differed.

The testimony of the plaintiff's witnesses was generally to the effect that the lode in the Tyler ground was from 120 to 200 feet in extreme width, and that both the foot and hanging wall, had been found at various points in the works of both Tyler and Last Chance. The weight of the plaintiff's evidence was to the effect that the workings in the Last Chance ground were on the vein which cropped in the Tyler and which the defendant had struck by working on the course of the vein from Last Chance surface ground. That the lode in the Tyler, on its course downward, passes under the surface of the Republican fraction, and also under the surface of the Last Chance, and that while the principal workings were under the surface of the Last Chance Company, defendant, and within the surface boundaries of that claim, they were upon the Tyler lode, and the ores therein belonged to it.

The plaintiff claims to have proven that the lode was a fissure vein which had been traced and identified from the

"Sullivan" mining claim on the southerly, to and through the "Bunker Hill," "Stemwinder," "Last Chance," Tyler, and other claims to the "Sierra Nevada," a distance of two miles, and the general character and kind, as well as the size of the lode were claimed to have been shown, as it is averred in the complaint. The plaintiff claimed also to have shown that the Last Chance Mining claim was located across instead of along the course of the lode; that its side lines so being across the lode were the limit of the rights of the Last Chance Mining Company to pursue the lode on its strike, and that its surface lines except for the distance across the lode contained no part of the apex of the vein.

The defendants' evidence was designed to show that the lode was a large section of mineralized rock from 1,000 feet in width upward. That its hanging wall or southwesterly limit had not been reached in any workings on the lode, and that the vein had croppings along the whole length of the Last Chance location; that all the workings were underneath the surface of the Last Chance mining claim, and it was insisted that it owned all the ground under such surface in virtue of its location. That it was the prior locator and that the judgment of the Court which was rendered in the First Judicial District of Idaho was conclusive of that fact. The defendant's witnesses testified that the lode was a "strata" vein, which consisted of a broad belt of rock which had been mineralized for a great thickness or width and that the Last Chance claim was located on this lode, and that its croppings existed throughout its entire length and breadth. The principal questions of law which arose in the progress of the trial, in the rulings of the Court, on the admission and exclusion of evidence, which we shall ask this Court to review, relate to the rights of locators of mining claims, under the Mineral Land Laws of the United States, and one or two questions of a general nature, and the correctness of the instructions given to the jury.

The questions of law which this record presents for decision by this Court are:

First. What are the rights of the owner of a location made under the mining law of the United States, who has

located his claim along the course or strike of the lode? Has he the right to follow it in its course downwards into the earth, and beneath the surface of the owner of the adjoining claims, whether his location be prior or subsequent to that of his neighbor? In other words, does the fact that a lode crops in the ground of "A" give him the right to follow it at a depth into the land of an adjoining owner? And is priority of location necessary in order to enable such owner in whose surface ground a lode crops, to follow it on its dip into the earth, beyond his surface side lines?

Second. What are the rights of the prior locator who locates his claim substantially across the course of the lode, as against a junior locator whose claim is laid substantially in conformity to its course when the conflict arises between such junior locator who follows the lode on its dip from its croppings or apex in his own ground, and the senior locator who follows the same lode from where it crops in his ground, by working longitudinally on the same, all such works being inside his surface lines?

The above questions arise in this case in the following manner:

The Court held that the Last Chance location, by reason of the effect it gave to certain record testimony received in evidence, was the older location of the two claims, viz.: Tyler and Last Chance, and by reason of that fact, gave to the Last Chance Company in this case, the benefit of being, as such older location, entitled to rights which would, but for that, be in the plaintiff. Because the Republican fraction, the Skookum fraction and Idaho fraction claims were junior locations to the Tyler, it gave the Tyler in this case the right to follow its lode downwards through and under these claims, which it denied to the Tyler as against the Last Chance. We challenge these rulings of the Court below.

Another important question arises in connection with the one above as to the ruling of the Court in admitting in evidence the record of the judgment of July 10th, 1890, in the suit entitled: The Last Chance Mining Company vs. Tyler Mining Company. None of the ground which was

in contest in that action, was involved in this suit. When the Tyler Company, by consent of the Last Chance, withdrew its answer and abandoned all claim to the ground, it ceased, as the plaintiffs herein claimed, to be a party to it, and any findings or judgment made at the instance of the plaintiff, were immaterial in this action. The plaintiff also contended that the judgment in that case was immaterial because the subject matter was not the same as in this. The defendants insisted that in order for the Last Chance Mining Company to recover in that suit, it had to allege its prior location and prove the same. That this involved not alone the particular piece of ground in dispute between the claimants of it, but the whole of such claim, and that necessarily the decision in that cause covered the question as to the whole location of each, and having been once adjudicated was conclusive, and the Court below so held, admitted the evidence, refused to allow any testimony to qualify or contradict it, and instructed the jury that it was conclusive of the prior title of the Last Chance Company, not only as to the particular parcel, but the entire claims of each.

Another question presented by this record is:

The proof shows that the Tyler and Last Chance and Republican fraction claims are locations made on a large lode which extends for a long distance in the district, it being traced and identified by heavy mining works and operations for a distance continuously of about two and a half miles. The surface of the country through which this lode cuts is mountainous and irregular, in places almost precipitous, furrowed by deep gorges, and with such topography, the apparent course of the lode on the surface, and its general course for long distances, is widely variant. This is increased by the further fact that the lode in its descent into the earth goes down at an angle.

Whether the locators of the different claims on this lode were deceived by the way in which the lode rose and descended the hills, and mistook its course, or made their locations at random, it is a fact apparent by looking at the "Model" which is in this record, that only two of all the claims located on this lode are marked on the ground so as

to correspond in their length, with the strike or course of the lode. The "Sullivan" and the "Tyler" locations seem to be the only exceptions. The Last Chance location is almost directly at right angles to the course of the lode, while the Tyler location corresponds practically with the lode. The Court below instructed the jury in substance that where a locator's end lines crossed the lode at an angle less than 45° from its course or strike, his right to follow the lode outside his surface was not limited by the outcrop of the vein at the surface between those lines, but that a party might follow the lode at depth at any point inside these lines extended in their own direction, though in so doing he was pursuing it longitudinally as well as on its dip. The correctness of this is challenged.

At the trial the plaintiff offered to show that the "Last Chance Mining" claim, was not in fact located on the 19th of September, 1885. That the location notice which it placed in evidence, showing that fact and bearing that date, was written in the town of Murray, more than 40 miles distant, on the 22d of September; that the easterly end stakes of the claim when it was located were planted 1380 feet further east than its present boundaries, and that a claim 1500 feet long commencing at these stakes would not reach or touch the lode, or what is now called the discovery. That no mineral had been found at the date of the notice, and that the mineral at what is now called "L. C." "Discovery" was not discovered until long afterwards, nor made at the time the notice was posted, nor had any discovery. This evidence was all rejected, and we insist erroneously.

The plaintiffs offered to prove that at the time the Tyler Company withdrew its answer in the suit in the District Court, the judgment in which was received in evidence, that said answer was withdrawn on a distinct understanding, between the plaintiff and defendant therein, that no judgment was to be taken against the Tyler Company. That it simply abandoned its claim to the ground in order to get rid of a controversy over that which it esteemed of no value, and that no costs were to be adjudged, and it was not to be prejudiced by the proceeding, and that it was not a party to any of the subsequent proceedings which took

place. The Court refused to receive the testimony, and we assign this ruling as error.

The plaintiff during the trial, and in the instructions which it asked the Court to give to the jury insisted that the proof showed the following state of facts:

That the Tyler location and claim was made lawfully and regularly on the lode. That it was a fissure vein varying in width from one to two hundred feet, with walls distinctly developed by the workings. That it entered through the northeast end line, after the Tyler had abandoned 427 feet of the southeast end of the claim, and passed through the entire length of the remaining 172 feet with its apex therein, and out of it through the southwest end line. That it dipped to the southerly under the surface ground of the Republican fraction, the Last Chance claim, and the "Idaho fraction," and "Skookum fraction" claims. That all the works of the defendants which were to the southwesterly of the southeasterly end line of the Tyler claim, projected in its own direction and drawn down vertically were on the lode so having its apex in the Tyler surface ground, and that the only lode or vein in said premises and works were the lode and vein having its apex in the Tyler. That the Tyler location and title to the same were perfect in the plaintiff, and that the defendants were in possession of and holding the same. As matter of law, following this condition of facts, the plaintiff insisted, at the trial, that the Court should instruct the jury, in substance, that the plaintiff was entitled to recover; or give such instructions to the jury that if it found the facts as we claimed them to exist, it would be entitled to recover.

The instructions for which we prayed, based on this view of the mining law, were not given, and others were given different in tenor and principle.

To state the precise question which each instruction asked and refused involved, and the precise error involved in each of the instructions which were given, to which we excepted, in advance of the argument, would be useless in view of the necessity of restating them in our argument. We have endeavored to state here generally the theory of the instructions asked and refused, and generally the theory of the instructions given by the Court. For particulars in this record, we refer the Court to the argument further on.

ASSIGNMENT OF ERRORS.

The following are the errors in detail assigned in the record:

First.—The Court erred in admitting in evidence plaintiff's Exhibit No. 6 (Location notice of Last Chance Mining Claim from Surveyor General's Office).

Second.—The Court erred in admitting in evidence the proceedings of the District Court of the First Judicial District of the Territory of Idaho in the action entitled "John M. Burke, Louis Goldsmith, Michael Carlin and Michael Flaherty, plaintiffs vs. The Tyler Mining Company, a corporation, etc., defendants" (Exhibit No. 7).

Third.—The Court erred in admitting in evidence "Defendant's Exhibit No. 8" (Notice of Last Chance location).

Fourth.—The Court erred in admitting in evidence "Defendant's Exhibit No. 9" (Receiver's duplicate receipt, showing purchase of Last Chance at United States Land Office).

Fifth.—The Court erred in admitting in evidence "Defendant's Exhibit No. 10" (United States Register's final certificate of entry).

Sixth.—The Court erred in refusing the plaintiff's offer to prove by the witness Honeyman to the effect that the time the judgment in the case shown in defendant's Exhibit No. 7 was given, it was rendered under an agreement between the plaintiffs in that suit and said Honeyman, Manager of said Tyler Mining Company, defendant, and upon terms which the plaintiff offered to show by said witness.

Seventh.—The Court erred in rejecting plaintiff's offer that the notice of the Last Chance location (Defendant's Exhibit No. 9) was not posted on the claim until the 22d day of September, 1885, two days after the location of the Tyler claim.

Eighth.—The Court erred in refusing to permit the witness Devine to answer the question: "State the circumstances under which you first saw the notice on the Last Chance claim."

Ninth.—The Court erred in sustaining the objection of the defendant to the question put by plaintiff's counsel to the said witness Devine: "When was that discovery—Last Chance discovery—made?"

Tenth.—The Court erred in its refusal to permit the plaintiff to prove by the witness Devine that there was any discovery of any kind of rock in place bearing precious metals upon the Last Chance claim, or within its boundaries until long after the location of the Tyler claim.

Eleventh.—The Court erred in refusing the plaintiff permission to prove that the notice of location (Defendant's Exhibit No. 9) was not drawn until December 22d, 1885, and was then drawn at the town of Murray.

Twelfth.—The Court erred in rejecting the offer of the plaintiff to prove that the boundary stakes of the Last Chance Mining Claim instead of being as they are now marked on the maps in this case at the easternly end, were 1380 feet further to the east, and that there never was any amended location of the claim, or change made in its boundaries until the survey of the Tyler claim in 1889.

Thirteenth.—The Court erred in refusing to instruct the jury as prayed for, as follows: Plaintiff's title to the surface ground of the premises described in this complaint as 1172 feet along the Tyler Mining claim, is established by the receipt of the Receiver of the Land Office, dated April 22d, 1889, and the accompanying certificate of entry, and that title relates back to the date of original location (as that may be found by the jury), when the discovery was made and the claim designated by the stakes and monuments on the ground.

Fourteenth.—The Court erred in refusing to instruct the jury as prayed for by the plaintiff, as follows: The title to the surface ground of the Last Chance is established by the receipt of the Receiver and accompanying certificate of entry. But the production of the notice of location bearing date does not itself prove the actual date of location. To establish that the defendants must show an actual location, discovery of a vein or ore-bearing rock, and designation by stakes of the premises upon the ground, and no evidence tending to prove that has been offered.

Fifteenth.—The Court erred in refusing to instruct the jury as prayed for by plaintiff, as follows: "There is evidence tending to prove, and from which you are at liberty to find, that the Tyler was located on the 20th of September, 1885. There is no evidence of the date of the location of the Last Chance prior to the date of the receipt of the Receiver, viz.: Oct. 31, 1891. Therefore for the purpose of this case, the Tyler must be considered the prior and older location."

Sixteenth.—The Court erred in refusing to instruct the jury as prayed for by plaintiff as follows: "The judgment in the case of the owners of the Last Chance against the owners of the Tyler—for certain premises not involved in this controversy—was rendered in a special proceeding to procure the patent of the United States to the premises described in that suit. The judgment was rendered after the owners of the Tyler had abandoned all claims to the premises described in the suit, and all rights of possession thereto. By abandoning the ground, the owners of the Tyler ceased to have any beneficial or real interest in the litigation, and the litigation was continued only to prove title against the United States, and the judgment recites that the 'plaintiff being required by law to prove its claim to the ground in controversy good as against the Government of the United States.' The judgment, therefore, will not be evidence against the owners of the Tyler, priority of the title to that part of the Tyler and Last Chance not being in controversy in that action."

Seventeenth.—The Court erred in refusing to instruct the jury as prayed for by plaintiff, as follows: "The relative dates of entry of the Tyler and Last Chance claims show, that the entry of the Tyler was prior to that of the Last Chance, and in the absence of other evidence showing the exact date of location, priority of entry would give priority of title."

Eighteenth.—The Court erred in refusing to instruct the jury as prayed for by the plaintiff, as follows: "If the jury find that the top or apex of a vein or ore-bearing rock is to be found outcropping in any part of its longitudinal course or strike wholly within the side-lines of the Tyler ground, then the plaintiff is entitled to recover so much of

said vein as may be proven to outcrop and have its top or apex within the surface boundaries of the Tyler, and may follow said vein in its dip outside of its side-lines into the lands of the defendants or any other persons."

Nineteenth.—The Court erred in refusing to instruct the jury as prayed for by plaintiff, as follows: "If the jury find that the top or apex of a vein or ore-bearing rock is to be found wholly within the side-lines of the Tyler ground, and that the true strike of said vein corresponds substantially with the course of the Tyler claim, and if the jury also find that the said vein in its longitudinal course passes out of one of the side lines of the Tyler claim into the premises of the Last Chance mining claim, then each party will be entitled to so much of the vein as such party owns of the apex, and each party will be entitled to follow the vein in its dip the whole length and depth of that part of which it owns the apex, without regard to the question of priority of location."

Twentieth.—The Court erred in refusing to instruct the jury as prayed for by plaintiff, as follows: "The junior locator who locates on the top or apex of an ore-bearing vein, which laterally lies wholly within his side-lines, is entitled to all the vein of which he owns the apex, and may follow it in its dip into the lands of the senior locator."

Twenty-first.—The Court erred in refusing to instruct the jury as prayed for by plaintiff, as follows: "Priority of location is material only as to that part of the vein of which the outcrop or apex in its width—not in its length—lies partly within both claims. If a wide vein crosses the side-line, then the older location is entitled to that part of the width of the vein while crossing the side-lines and no more."

Twenty-second.—The Court erred in refusing to instruct the jury as prayed for by plaintiff, as follows: "The locator of a mining claim has an exclusive right of possession of all the surface included within the lines of his location, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations."

Twenty-third.—The Court erred in refusing to instruct the jury as prayed for by plaintiff, as follows: "Upon the evidence before you these parties (Plaintiff and Last Chance Mining Company) are to be regarded as owning the surface of the land by them respectively claimed, and all that goes with the surface under the law.

No question is presented as to the right of plaintiff to the Tyler location. Holding by entry and Receiver's receipt from the Government, the plaintiff must be regarded as the owner of its claim and all lodes and veins existing therein. The statute gives the owner of the lode, the one who may locate it at the top or apex, the right to follow it at any depth, although it may enter the land adjoining. And if the Tyler location was made on a lode or vein which descends from thence into the Last Chance location, the right of the plaintiff to follow the lode into the Last Chance ground, and to take out ore therefrom, cannot be denied."

Twenty-fourth.—The Court erred in refusing to instruct the jury as prayed for by plaintiff, as follows: "If the jury find the outcrop or apex of the vein is not so wide as the Tyler, and that the vein in its course runs substantially as displayed on plaintiff's map, then if the Tyler is the older location, it would be entitled to the whole vein to the length claimed; and if the junior location, it would be entitled to all the vein to the point where the hanging-wall enters an older location, and the dip thereof on a line drawn through the hanging-wall—at the point aforesaid—parallel to the end-line."

Twenty-fifth.—The Court erred in refusing to instruct the jury as prayed for by plaintiff, as follows: "To determine whether a vein or lode exists, it is necessary to define those terms, and as to that it is enough to say that a lode or vein is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountains. In this definition, the elements are the body of mineral or mineral-bearing rock and the boundaries; with either of these established, very sleight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountains, so far as it may continue unbroken and without interruption, may be regarded as a lode whatever the

boundaries may be. In the existence of such a body and to the extent of it, boundaries are implied. On the other hand, with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if any such fissure is found, although at considerable intervals and in small quantities, it is called a lode or vein."

Twenty-sixth.—The Court erred in its refusal to instruct the jury as prayed for by plaintiff, as follows: "This is an action by the plaintiff to recover possession of certain premises described in the complaint out of which the plaintiff alleges it has been ousted by the defendants, and to enable it to recover, the plaintiff must show that at the commencement of the action it was the owner of and entititled to the possession, and that it has been ousted therefrom by the defendants or some of them."

Twenty-seventh.—The Court erred in its refusal to instruct the jury as prayed for by plaintiff, as follows: "The plaintiff (to prove its ownership to the premises demanded), introduced in evidence the certificate of purchase issued to it by the United States Land Office at Cœur d'Alene City, Idaho, in April, 1889, showing that it has entered and paid for (to the United States) the lands described in the complaint, and you are instructed that this is proof of the ownership of the plaintiff of all surface ground described in the complaint, and of all lodes or ledges of mineral-bearing rock and earth, the top or apex of which crops within such surface, and if in their course downwards into the earth such lodes or ledges depart from the perpendicular so far as to extend outside of the side-lines of said premises drawn downwards vertically, then the plaintiffs are still the owners of such lodes within planes drawn vertically downwards through the end-lines of the surface described in the complaint, and entitled to recover the same from the defendants, or any portion of them, which the defendants, or any of them, may be shown to have taken possession of."

Twenty-eighth.—The Court erred in its refusal to instruct the jury, as prayed for by plaintiff, as follows: "Any intrusion of the defendants upon any lode or ledge of mineral bearing rock which has its top or apex in the surface ground

of the Tyler, is just as unlawful as though the points or places where it occurs, are not perpendicularly under the Tyler surface, as if it were under or within the limits of such surface. And such an intrusion is a violation of the possession of the Tyler Company, though it may be upon portions or parts of the lode which lie outside of the side-line of the said Tyler premises, and may not have been worked prior to such intrusion by the defendants. The limit of the right of possession by the owners of the Tyler premises to any lode which crops in its surface, being bounded by the end-lines of that surface drawn downwards vertically, and extended in their own direction until they intersect such lode in such parts thereof as extend outside of the vertical side-lines of such ground."

Twenty-ninth.—The Court erred in its refusal to instruct the jury, as prayed for by plaintiff, as follows: "You are instructed that the law contemplates that a miner shall in locating his claim locate it along the lode as it is disclosed on the surface, if it is so disclosed. And if the locator shall embrace within the side-lines of his location the top or apex of the lode and the end-lines cross the vein or lode, then if the location is otherwise valid, he is entitled to all of such vein or lode in its downward course, although in such case it may so far depart from a perpendicular as to pass outside of the vertical side-lines and pass under the surface of the land which is owned or occupied by another. And the limit of his right to such outside parts of the lode is found in the end-lines of his claim, drawn downwards vertically and projected in their own direction until they intersect such outside parts of such vein or lode."

Thirtieth.—The Court erred in its refusal to instruct the jury, as prayed for by plaintiff, as follows: "If the side-lines of a mining claim are laid by its owner across the course of the lode or ledge, or substantially across the general strike or course of the same on the surface, his right to pursue said lode in its downward course is subordinate to the right of the adjoining owner, who has located his side-lines substantially along the course of the lode. And in no case has any owner by virtue of his location of any mining ground the right to follow any vein or lode beyond the point in its strike where his surface lines cross the lode, whether such

lines shall be in form on the surface, side-lines or end-lines. If the surface lines cross the lode, they are the limit to follow it lengthwise, either at the surface or beneath the surface. And if in such case the side-lines on the surface shall be so laid as to both cross the lode on the surface also intersect the end-lines of the adjacent owner, extended in their own direction, who is located substantially along the vein, and whose end-lines cross it, then as to such parts of the vein as are embraced between the end-lines of said adjacent owner, extended in their own direction, the same is the property of said adjacent owner."

Thirty-first.—The Court erred in its refusal to instruct the jury as prayed for by plaintiff, as follows: "If you find that the Last Chance claim is located across the lode in question, and that the Tyler claim is located along the lode in question, then the plaintiff is entitled to follow downwards such vein or lode as crops within its surface, and is the owner of all the ores in the same which may be found between its end-lines projected in their own direction to any depth, notwithstanding the facts that within such limits the Last Chance may own the surface ground lying vertically over such parts of said lode or vein."

Thirty-second.—The Court erred in its refusal to instruct the jury, as prayed for by plaintiff, as follows: "The parties to this controversy claim that there is but one lode, and each insists that its discovery and location are on one and the same lode. The main controversy seems to be as to the size or width of the lode, and as to the rights of those who own ground upon it, or claim to own it.

If you shall find that the width of the lode at the surface is such that it crops throughout the entire length of the Last Chance claim, and that the Last Chance is the oldest claim; then, though the entire width of the claim does not embrace the width of the vein, the plaintiff cannot recover; because, the location on any part or the croppings of a vein, or the length of a vein, covered by that location, will embrace the whole of the lode which it contains. But if on the proofs you find that the Tyler ground embraces the lode in its width, and that it crosses into the Last Chance ground in its course; then, the plaintiff is entitled to follow in its dip so much of the lode, the top or apex of which is em-

braced in the Tyler ground, limited only at depth by planes drawn through its end-lines, and projected in its own direction across the course of the lode."

Thirty-third.—The Court erred in its refusal to instruct the jury, as prayed for by plaintiff, as follows: "The evidence shows that the plaintiff originally surveyed the Tyler location for patent as shown by the map 'Exhibit A,' ..... feet in length, and that in April, 1889, it abandoned 427 ft. of the southeast end of the claim, and entered and paid for the claim as described in the complaint. I charge you that this action did not affect the ownership or right of the Tyler Company of its claim thus entered under its original notice of location. It had the right to abandon such portion of its original claim, without any prejudice to its rights to the remainder and such rights are co-eval with the date of the location which included the portion so abandoned."

Thirty-fourth.—The Court erred in its refusal to instruct the jury, as prayed for by plaintiff, as follows: "The law contemplates that the location of a mining claim upon veins, lodes or ledges shall be made lengthwise along the course of the vein, at or near the surface, and that the end-lines of the location shall be laid substantially crosswise to the general course of the vein. If the location is so laid that the top or apex of the vein passes through one end-line, and longitudinally through the claim within the side-lines thereof, and passes out of the other end of the claim, the locator is entitled to the exclusive right of possession of this vein throughout its entire depth, although in its downward course it may so far depart from a perpendicular as to extend beyond the side-lines of his claim drawn downward vertically. Provided, that his rights to the possession of such outside parts of the vein shall be confined to the planes drawn downward vertically through the end-lines of the claim, and extended in their own direction so as to intersect such outside parts of the vein. But, if the locator, instead of locating along the vein, lays his location diagonally across the vein, he only obtains so much in length of the vein as he has included of the apex thereof, within the lines of his location; in other words, where he locates diagonally across the vein, the end-lines of his location will, in law, be drawn in parallel to where they are, to points where the top or apex of the vein

passes through his side-lines, and if he has so located his claim that the top or apex of the vein enters his claim through an end-line, and passes out through a side-line the other end-line of the claim will, in law, be drawn in to where the vein passes out through his side-line, and this portion of the vein he will be entitled to follow in its downward course to any depth, so long as he keeps within the planes of his end-lines drawn vertically downward and extended in their own direction, as before stated.

Now, I instruct you, that if you find from the evidence, that the apex of the vein, in its longitudinal course, enters the Last Chance claim through the southerly side-line and passes through the claim diagonally in a northerly or northwesterly direction, and passes out through the north side-line then beyond this point where the apex of the vein passes through the north-side line, the defendants can make no claim to the vein under the Last Chance location; for the reason that the Last Chance claim will in extent be precisely the same as if the west-end line of the claim was drawn in parallel to where it now is to this point where the apex departs through this north-side line."

Thirty-fifth.—The Court erred in its refusal to instruct the jury, as prayed for by plaintiff, as follows: "I further instruct you, that if you find that the apex of the veins passes through the Last Chance claim in the manner above indicated, and passes out through the northerly side-line of the Last Chance claim into the Tyler mining claim at the southeast corner of the Tyler claim, part of the vein passing into the Tyler mining claim through the southeast end-line, and part of the vein passing through the southerly side-line of the Tyler mining claim, and continues in a northwesterly direction entirely within the side-lines of the Tyler claim, passing out through the northwest end-lines of the Tyler claim, and that said vein, in its downward course departs from a perpendicular in a southwesterly direction and descends into the ground in controversy in this action; then I instruct you that the plaintiff will be entitled to recover all of that part of the vein in controversy that lies between the planes of the end-lines of the Tyler claim, drawn downwards vertically and extended in their own direction so as to intersect the part of the vein lying outside of the Tyler location, excepting such part thereof as shall lie within the planes of

the end-lines of the Last Chance location so drawn in as above stated to where the apex of the vein passes through the northerly side-line of the Last Chance claim."

Thirty-Sixth.—The Court erred in its refusal to instruct the jury as prayed for by plaintiff, as follows: "If the jury find that each of the defendants, The Last Chance Mining Company, The Republican Mining Company and the Idaho Mining Company, have severally entered upon the surface of the ground underneath which a vein belonging to the plaintiff, descends in its downward course, and that each of said defendants claim a portion of said vein adversely to plaintiff, and have worked it together by a common agent: then the plaintiff is entitled to recover against said three defendants jointly, and also against the other defendants in possession adversely to plaintiff, provided, under the other instructions, you find plaintiff entitled to recover at all."

Thirty-seventh.—The Court erred in its refusal to instruct the jury, as prayed for by plaintiff, as follows: "The plaintiff is entitled to recover against all defendants who have filed a disclaimer, as such disclaimer is an admission of plaintiff's right."

Thirty-eighth.—The Court erred in all that portion of its first instruction to the jury in words as follows: "Concerning the two following instructions I will say to you: that they remove from your consideration certain questions of fact—questions which counsel have differed very much upon, and which they have referred to largely in their arguments; but by my understanding of the law I am compelled to take those questions from you, and even though they may not seem like the law to you, and though they may not be the law, yet you are bound to take these instructions. If I have erred in the instructions I give here, the parties have a way of reversing them by another Court, but you are bound to take these as the law, and it removes from your consideration certain facts in the case.

Thirty-ninth.—The Court erred in its second instruction to the jury which is in words as follows: "Both plaintiff and defendants Last Chance Company have introduced such evidence of title to the respective locations, including the

certificate of final entry to the Land Office and a stipulation as to title as to show each entitled to the surface ground of their respective claims, as claimed and described by them severally in their pleadings, and also to all ores within such surface contained until otherwise shown and to any ledge the apex of which is found within the vertically extended planes of the boundary lines of the claims, with the right to follow it in its downward course to any depth.

That you may understand that, I further state to you, that that applied to the Last Chance claim as marked upon that map, and to the Tyler claim as marked upon that map for a distance of about 1072 feet, commencing at that line three or four hundred feet from this end."

Fortieth.—The Court erred in all that part of its third instruction to the jury, which is in words as follows: "And the defendant Last Chance Company shows by the evidence of a judgment which cannot be disputed in this action, that its Last Chance Claim was located on the 17th day of September, 1885, from which it follows that the Last Chance claim is the older.

Now upon this point I repeat to you, that so far as this trial is concerned, and so far as you have any consideration of the matter, the dates of those two claims are fixed by evidence you cannot consider further."

Forty-first.—The Court erred in that part of the last subdivision of its fourth instruction to the jury, as follows: "Unless it comes in conflict with some prior locator who had also located a claim in such manner as the law will justify."

Forty-second.—The Court erred in all that part of its sixth instruction to the jury, which is in words as follows: "And those he designates as end-lines perform the office of side-lines, and his rights are measured accordingly. In such case, the lines which he had located as his side-lines become the lines between the vertical planes of which he may follow his ledge to any depth. It must be conceded that neither of them are running along exactly lengthwise of the vein."

Forty-third.—The Court erred in all that part of its seventh instruction to the jury, which is in words as follows: "From these maps you can, by the underground workings,

and especially those made in the natural process of working, and not those made for the purpose of demonstrating a theory, locate the drifts and inclines, and course, and dip of the ledge. The walls of the ledge when well defined, where exposed for considerable distances or at different places along the same level, are good guides as to the course of the vein."

ARGUMENT.

In the argument, we shall discuss this case more in the order in which the subject matter presents itself than in the order in which the errors assigned appear in the record, as the assignments have been made chronologically as the errors alleged occurred, no regard being had to logical arrangement; nor will we discuss each separate assignment. A few prominent questions will be decisive, and while no error has been assigned that we feel willing to abandon, we assume that the minor ones will either at once vindicate themselves on inspection, or that the Court will treat them as unworthy of investigation. Mere technical errors are apparent at a glance and need no argument, if they are sufficient to demand notice.

Without going into a detailed statement of the testimony here it will only be necessary to the fair presentation of our argument to state the prominent and leading facts as we claim them to have been established, or that the testimony tended to establish. Our dispute in this case has arisen by reason of an alleged trespass upon what is described in the complaint as the Tyler Mine, by the defendants. The plaintiff is a corporation called the Tyler Mining Company, formed under the laws of the State of Oregon. It is the owner of the Tyler Mining claim and lode, lying in Shoshone County, Idaho, and said claim as shown by the maps and diagrams before the Court is 1072 feet in length by 600 feet in width. Its title is derived from a location made under the Mineral Land Laws of the United States, conveyances from the locators and grantees to the present owners, and an application by the corporation to the United States Land Office at Cœur d'Alene City, for patent and a purchase from the United States. There is no dispute as to the plain-

tiff's ownership of the Tyler claim. The contest arises as to its rights as such owner.

The defendants justify the alleged trespass on several grounds; first, it may be stated, that the defendants admitted throughout this case at the trial, that the work which we alleged they had done and which is indicated as their work on these maps and diagrams, was done by them. The Last Chance Company admits that all the work within the boundaries of the Last Chance claim, as laid down on the maps of both plaintiff and defendants, was done by it. The Republican Mining Company admitted that all the work done within the limits of the Republican fraction claim, was done by it, and the Idaho Mining Company admitted that all work done within the Skookum fraction and Idaho fraction limits, was done by it; and Sweeney testified at the trial that Moore was the president of each one of these companies and that he, Sweeney, was the superintendent of each, and as such did all the work, and directed all that was done of which the plaintiff complained.

The defendants proceed to justify these alleged trespasses:

First. They deny that the Tyler Mining Company have any right to pass outside its surface side lines, or own any lode that lies under the surface of either the Republican, Last Chance, Skookum fraction or Idaho fraction claims. That raises the question as to what the rights of the owner of the Tyler claim are under the mining law.

Second. The Last Chance Company claim immunity from any demand on behalf of the Tyler Company on the further ground: that the Last Chance claim is an older location than the Tyler and that this fact will prevent the Tyler owners from following the lode which may have its apex in Tyler ground, through or into the Last Chance. That construction involves the question of fact as to which is the prior location. This was decided by the Court below as a matter of law, and no proof controverting the Last Chance claim in that respect was allowed.

This proposition also involves the question as to what are the rights relatively of prior and junior locations, as to

the right of the locator having the apex of the lode to follow it in depth into the adjoining claim. Does the question of priority of location have any bearing in such a contest, and if so, what? It was held by the trial court in this case, that if a prior locator marked the end lines of his location at an angle to the strike of the lode less than 45° he could follow such lode on such angle as it descended into the earth within these end lines, projected to any depth, as against a junior locator. But the Court held that the owner of a junior location could not enter the limits of a prior locator, though he might have the apex of the vein in his own ground, and that for ores taken by the "Last Chance" out of any ground within its own surface limits, the Tyler could not recover. It is true that the Court did not instruct the jury that the above was the law, but it refused to instruct the jury that the Tyler Company had the right follow its lode in depth between its end lines projected in their own direction, which so far as the Tyler rights are concerned, is the same thing.

A defense to the claim of the Tyler resting upon its right to follow its lode, was also made upon the following theory of the case. That the lode upon which these claims were all located was a wide belt of quartzite from 1000 to 1500 feet in thickness, which constituted one lode, and that the Last Chance claim in virtue of its priority of location (which the Court held was conclusively settled for the jury) had a right to all the minerals within its surface limits to any depth, and that as all the work of extracting ore by said Company had been from inside of those limits, the defendant was only mining its own ore, and was not liable.

This claim was the particular contention which prolonged the testimony at the trial and occupied the attention of the witnesses. It is not so important here, and in fact it need hardly be considered in the argument of the case, except for the incidental connection it bears to some of the other questions.

The audacity of insisting upon such a theory, in the face of the other admitted facts, may well challenge admiration. The probability that it may have had some influence in securing the verdict which the jury rendered in this case

is hardly worth consideration. We bring the testimony on that, as well as the other features of the case, to make this Court see the entire condition of facts which existed when the case was submitted to the jury.

The first twelve assignments of error are based upon rulings of the Court in the admission and exclusion of evidence. For the present we pass by the first assignment, as we shall advert to that in another group of alleged errors, involving the same objection, later on.

The second assignment we insist is well founded. The condition of facts at the time of this offer on the part of the defendants was this: The plaintiff had shown its ownership of the Tyler claim, and had by the testimony shown that the vein cropped in the Tyler ground and in its descent into the earth at an angle of about 40° had been traced on ore, down into the workings of the Last Chance Mine, and that such workings are westerly of the north-easterly end line of the Tyler claim extended in its own direction when drawn downwards vertically. No part of the ground either on the surface or underneath the surface was in conflict in the suit, the record of which was offered. The record itself discloses the fact that not only was none of the ground or of the lode which it was claimed had been trespassed upon was involved in that suit, but it showed on its face that, the judgment in the case by which we were sought to be bound, was one that was rendered after we had withdrawn from the case, and had no further interest in the litigation. It appeared that the proofs were taken and a judgment entered in favor of the plaintiff, in order to enable the plaintiff, the Last Chance Company, *to establish its rights as against the United States*, and at a time when there was no dispute or contest in any form between the Last Chance and Tyler Mining Companies. We do most respectfully but earnestly insist that the admission of this record was erroneous:—

First. Because it discloses on its face facts which make it a nullity. The defendant withdrew its appearance and answer, abandoned all claim to the premises sued for, and left neither cause or issue to try.

Second. The case was retained in Court not to determine any issue between the original parties to the action, but for

the express purpose of trying the question of the rights of the plaintiff against the United States. There is no provision in the statute for such a trial or such a suit, hence the entire proceeding was without the statute and of no force. The provision that in a trial between adverse claimants the findings shall determine also the issues between the successful party and the government has no application, because there were no adverse parties after the Tyler had abandoned its claim to the property.

Third. The subject matter of the suit was different. The issue, if any there was, was as to the "right of possession" of the respective parties to the piece of ground in dispute, no part of the lode or location which the Tyler seeks in the present action to recover, was involved in that suit. To operate as an *estoppel* the subject matter must be the same.

Barrows v. Kindred, 4th Wall., 399.

Fourth. The parties are not the same. The judgment was rendered after the Tyler Company had ceased to be a party, and the findings and judgment were simply on the theory that the plaintiff was a party plaintiff and the United States a defendant. The judgment therefore was not between the same parties.

Fifth. Admitting that the plaintiff had a right to take judgment for want of answer, it could only be conclusive of the ownership of the plaintiff to the ground *in dispute.* The allegations of probative facts in the complaint are not admitted by a default. The ultimate fact was, who, when the suit was brought, was the owner of the right of possession in the disputed premises. It would not matter what particular facts were stated in this complaint, if plaintiff could establish its right of possession it would be entitled to judgment. A default was no admission of the particular evidentiary facts stated in the complaint. If the plaintiff had simply shown an abandonment by the defendant of its claim to the ground, it would have proved all that the law required, or if it had produced a quit claim deed from defendant or its grantor and its own appropriation, the result would have been the same as a trial. A party may allege

in his complaint a title in fee, and recover without showing any grant or paper title whatever. The point in dispute, if any could be said to be in contest, when the judgment was rendered, was not who located first, but who then owned the ground. The fact of prior location could only have been incidental, and it never was tried by the parties.

On a default the plaintiff can have no relief beyond that "demanded in his complaint."

The Idaho Statute reads:

"The relief granted to the plaintiff if there be no an-
"swer cannot exceed that which he shall have demanded in
"his complaint, but in any other case the Court may grant
"him any relief consistent with the case made in his com-
"plaint and embraced within the issue."

Rev. Statute of Idaho, Sec. 4353.

Treating this as the Court below did this judgment, as one rendered on a default, the judgment is beyond the relief demanded. It seeks not only to bind the defaulting or absent defendant by adjudging the plaintiff to be the owner of the premises sued for, but to go further and find that the plaintiffs held by a particular title, and bind the defendants. A default only admitted that the plaintiffs were entitled to have a judgment for the land. We might have been willing to abandon a perfect claim to it, because it was not worth litigating, or for any reason allow them to take judgment, rather than waste time or expense in litigation, and for that reason surrendered it; therefore a default is not *evidence of any particular state of facts*, upon which the plaintiff might rely or may have stated.

In *Cromwell v. County of Sac*, 94th U. S., page 356, Judge Field, in referring to a case that had been contested below, makes these remarks:

"Various considerations, other than actual merits, may
"govern a party in bringing forward grounds of recovery,
"or defense in one action, which may not exist in another
"action upon a different demand, such as the smallness of

"the amount or the value of the property in controversy, the "difficulty of obtaining the necessary evidence, the expense "of the litigation, and his own situation at the time. A "party acting upon considerations like these ought not to be "precluded from contesting in a subsequent action other "demands arising out of the same transaction. *A judgment* "*by default only admits for the purpose of the action the* "*legality of the demand or claim in suit; it does not make the* "*allegations of the declaration or complaint evidence in an* "*action upan a different claim.*"

The answer made to us when this ruling by Judge Field from the bench of the United States Supreme Court was presented was, that the case of *Cromwell v. County of Sac* was a contested case, and that no default judgment having been involved the remarks of the Justice were mere *dicta*. We submit, however, if a record in a case which is contested is not to be held to *estop* a party, there can be certainly less reason to *estop* a party by a record when there is no contest. In that case a suit had been brought to recover on an interest bearing coupon attached to a bond. The defense was found in the making of the bond, which was successful, and the judgment in defendant's favor was affirmed by the United States Supreme Court. Afterwards holder of the bond itself brought his action, and the former judgment was pleaded in bar, and sustained. On appeal the United States Supreme Court reversed the judgment, and on the reversing, a paragraph from which we have quoted, sent the case back for a new trial. We submit that the case is in principle identical with the one at bar and should govern it.

Sixth. The judgment could in no event be binding beyond the property then in dispute.

Black on Judgments, Sec. 241, Secs. 609 to 619 *Id.*

The effect of the ruling of the Court below was not only to decide that the Last Chance Mining Company was the owner of the little triangular piece of ground claimed, but to determine for all time, between these parties, that the Last Chance location was made prior to the Tyler location, and this without a suit involving the right to a foot of the Tyler ground, 1072 feet to the west, deprive it of its

rights, which it would, if it be in fact the prior locator, be entitled to. Instead of adjudicating the rights of the parties to matters before it, a Court on this theory is actually determining rights to property not before it, and shutting out the truth by declaring these rights determined at a time when they in fact were neither attacked or defended.

"A judgment by default merely admits *a cause of action*, "but while the precise character of the cause of action, and the "extent of the defendant's liability remain to be determined "by a hearing in damages (in cases of that character) and "final argument thereon, the cause of action is not merged "in the judgment, and the rights of the parties *beyond the* "*mere admission of a cause of action, are neither strengthened* "*or impaired thereby.*"

Black on Judgments, Sec 87.

The foregoing goes to the admissibility of the judgment for any purpose. But we insist that the purpose for which it was introduced, to show the prior location of the Last Chance, made its admission erroneous, on the ground of immateriality. The action provided for in these adverse mineral cases, is an action to try the abstract "right to the possession." It is what is called in the code at law, an action of ejectment, or an action to quiet title, depending on the circumstances.

The judgment in this case was such as would have been rendered in an action for the possession at law. It has been often held in these possessory actions under the code, that the judgment is only conclusive of two points. The right of possession in the plaintiff *at the commencement of the action*, and the with-holding, by defendant, if in possession.

Yount v. Howell, 14th Cal., 468.
Murray v. Green, 64th Cal., 369.

So in New York it is held, that:

"A judgment is conclusive upon the parties thereto, "only in respect to the ground covered by it, and the *facts* "*necessary* to uphold it: and although a decree in express "terms professes to affirm a particular fact, yet if *such fact*

"*was immaterial to the issue*, and the controversy did not "turn upon it, the decree will not conclude the parties in "reference to such fact, hence the record of the Court "in such cases cannot be admitted in evidence in a subse- "quent suit between the same parties to establish the fact "thus incidentally affirmed."

People ex rel. Reilly v. Johnson, 38 N. Y., 63.

"In order that a judgment may constitute a bar to "another suit it must be rendered in a proceeding between "the same parties or their privies, and the point of contro- "versy must be the same in both cases, and must be de- "termined on its merits,"

Hughes v. United States, 4 Wall., 237.

Lastly:

The judgment in the action which was offered and admitted was in a special proceeding in aid of the Land Department, to enable it to decide a question before it, viz.: to whom a patent should be issued by that Department for the particular land claimed. It was a binding adjudication *only for that purpose*, and it could not be admitted as a bar on questions which were only incidental to it. It would not follow necessarily that because the Last Chance Company had the best right to the particular piece of ground (if it had been then in dispute, which it was not), that the Tyler location was subsequent to it: The proceeding was only one of the series of steps taken by the Land Department, and had none of the binding force on the parties of a judgment beyond what attached to it as a Department proceeding. If, in other words, the Land Department issue two patents to the same parcel of land, the mere recitations in the patent is not conclusive as to the rights of the parties, but evidence to establish the earlier equity is always received. If a patent is not held conclusive, certainly a mere step taken to acquire it, cannot be. In this connection the sixth assignment of error is proper to be considered, as it grows out of a ruling of the Court on our offer to prove orally facts intended to apply to the judgment.

Best v. Polk, 18th Wall., 116.

After the defendants had concluded their case, the plaintiff offered in rebuttal, to prove by the witness Honeyman, who was the manager and representative of the Tyler Mining Company, that the withdrawal of the Tyler Company of all claim to the piece of ground which had been in dispute, was made upon terms that were agreed upon between the parties and all the circumstances, to show that the judgment was to be without costs or prejudice to the Company, but was an abandonment of the ground and no more. This the Court refused. We insist it was error to do so.

We did not offer to impeach the judgment itself, but we had a right to introduce testimony to limit it to its proper subject matter and purpose. The authorities on this point are unanimous.

Black on Judgments, Sec.
Washington, Alexandria & Georgetown S. & P. Co. v. Sickles, 24 How., 333.
Campbell v. Rankin, 99 U. S., 263.
Davis v. Brown, 94 U. S., 423.
Miles v. Caldwell, 2 Wall., 42.

In the light of the foregoing authorities, and of fundamental principles, it seems that these rulings must be held to be erroneous.

Passing from this group of exceptions we come to the question which is included in those instructions bearing upon the rights of a locator under the mining laws of the United States, to follow his lode in depth. What are the rights granted by the Act of 1872? What are the extent and limitations of the grant? No case has arisen which presents more fully the question involved in a construction of the Act in question than the present one.

The *Flagstaff* case, 95 U. S., presents the question in a simple form. The case of *Argentine v. Terrible* presented a more complicated question, and the *Elgin* case another still more embarrassed by its peculiar facts. The cases of *Amy Silversmith* and of *Clark v. The Montana Copper Co.*, the first reported in the 9 Montana Reports, and the last

described in the U. S. Circuit Court for the District of Montana, all deal more or less with the questions involved here. The *Flagstaff* is the first decision in the series and determines that:

"Mining locations on lodes or veins shall be made "thereon lengthwise in the general direction of such lodes "or veins on the surface of the earth where they are "discoverable; and that the end lines are to cross the lode "and extend perpendicularly downwards and to be con- "tinued in their own direction either way horizontally; and "that the right to follow the dip outside of the side lines is "based on the hypothesis that the direction of these lines "corresponds substantially with the course of the lode or "vein at its apex on or near the surface. It was not the "intent of the law to allow a person to make his location "crosswise of a vein so that the side lines shall cross it and "thereby give him the right to follow the strike of the vein "outside of his side lines. That, would subvert the whole "system sought to be established by the law. *If he does "locate his claim in that way his rights must be subordinated "to the rights of those who have properly located on the "lode. Their right to follow the dip outside of their side "lines cannot be interfered with by him.* His right to the "lode only extends to so much of the lode as his claim "covers. *If he has located crosswise of the lode and his claim "is only 100 feet wide, that 100 feet is all he has a right to.*" —pp. 467-8.

Again:

"As the law stands we think that the right to follow "the dip of the vein is bounded by the end lines of the "claim *properly so called;* which lines are those which are "crosswise of the general course of the vein on the surface. "* * * * * Our laws have attempted to establish "a rule by which *each claim shall be so many feet of the vein "lengthwise of its course, to any depth below the surface,* "although laterally its inclination shall carry it ever so far "from a perpendicular."—p. 468.

This case decided one proposition in language so distinct and emphatic that from that day to this there seems

to have been no misapprehension on the subject—and that was: that *so many feet of the lode in length as the surface boundaries of a location covered*, was the extent of his claim along the lode. The proposition is not only clearly stated, but all the illustrative remarks and reasonings accompanying it demonstrate that that was the point intended to be decided.

Accepting this construction as the law, the plaintiff asked the Court to instruct the jury as follows:

18th Request. "If the jury find that the top or apex "of a vein or ore-bearing rock, is to be found outcropping in "any part of its longitudinal course or strike wholly within "the side lines of the Tyler ground; then the plaintiff is "entitled to recover so much of said vein as may be proven "to outcrop and have its top or apex within the surface "boundaries of the Tyler, and may follow said vein on its "dip outside of its side lines into the lands of the defen- "dants." (Trans. p. 323.)

There being testimony tending to prove that the vein entered the east end of the Tyler claim through the corner of the claim, this instruction was intended to insist upon the right of the Tyler to only so much of the vein as actually wholly cropped inside its side lines. It did not claim as much as the doctrine of the *Flagstaff* decision guaranteed us.

The 19th request to charge was to the effect:

"That if the jury find that the top or apex is found "wholly within the side lines of the Tyler, and that the "strike of said vein corresponds substantially with the "course of the Tyler claim, and if the jury find that the "said vein in its longitudinal course passes out of one of the "side lines of the Tyler claim into the premises of the Last "Chance claim, then each party will be entitled to so much "of the vein as such party owns of the apex and each "party will be entitled to follow the vein on its dip the "whole length and depth of that part of which it owns "the apex, without regard to the question of priority of "location." (Trans. p. 324.)

This request was a still more distinct and perfect iteration of the rule laid down in the *Flagstaff* case, except that while the matter of priority of location is only incidentally alluded to in the *Flagstaff* decision, it is in effect decided in that part of the opinion which declares "that the rights of one who locates across the lode shall be "subordinate to the rights of one who locates properly "*along the lode*," and in another paragraph mentioned hereafter.

The twentieth and twenty-first requests make still more emphatic our position as to the effect of time of locations upon their rights, and covers the same point. Neither the statute or any decision made under it by the Supreme Court of the United States, furnishes any ground for withholding from a locator, who has covered the apex of his vein by a proper location, the full benefit of his right to pursue his vein on its dip, because a prior locator has taken possession of an adjoining section of the vein and has covered the portion of which the apex is in the former's location by his surface lines. The defendants urged this latter view before the Court below with much persistency, as being sustained by the case of the *Argentine v. Terrible*, 122 U. S., 478.

In that case neither the plaintiff or the defendant had located properly on the vein. Both had located crosswise of the vein and the question was whether as the plaintiff's own side lines (end lines in that particular case) which were cut off by the end lines (located as side lines) which the law requires shall be drawn down vertically, could prevail as against such prior location. It was not a case wherein claim properly located along the lode was antagonized by one located across the lode, as in the illustration put by Judge Bradley in the *Flagstaff* case but a case where the original locator had struck the vein on its flank, not on its apex, but by sinking down until he found it. Afterwards the plaintiffs discovered the apex and themselves located the claims called the Camp, Bird and Pine and tracing the vein from the apex down on its dip *between their side lines* which crossed the side lines of the Adelaide, brought suit for ores taken from within the Adelaide claim. Instead of being a qualification of the *Flagstaff* decision it is in entire harmony with it. It went further. It compelled a

man who insisted in recovering against an actual occupier should show a better right, and in a conflict between two persons who neither have complied with the law, the one prior in time had the better right. The facts in that case and the conditions in this case are totally unlike. Assuming that the Last Chance is the older location; its discovery is on the cropping of the vein adjoining our own, instead of locating "along the vein" as our claim is located, it located across the lode and seeks to cut us out of the vein that we have located "properly" according to law, by extending its side lines over ground which is underneath the apex in ours. However that case may be viewed it certainly cannot be held to overrule the decision in the *Flagstaff* case which it quotes with approval.

It simply decides that a location made by a plaintiff across the lode did not give him the right to follow under the surface of his patented ground against the previously acquired possession of one who had located also across the lode. The case leaves in doubt whether a party who locates across the lode where the law requires a location to be along the lode, shall have the benefit of following the apex of so much as he possesses on its dip. The right was refused in the *Argentine* case, one reason being it was met by a prior possessor. That was reason enough for that case and was decisive.

One other reason was alluded to in that case which made the plaintiff's contention in the case untenable. The patent under which the title to the Camp, Bird and Pine locations passed to it excluded the rights it claimed, the exception being: "Excepting and excluding, however, all that portion "of said surface ground, embraced by mineral survey No. "254 of the Adelaide Mining Claim, and also excepting and "excluding all veins, lodes or deposits the tops or apexes "of which lie inside of the exterior lines of said Adelaide "survey at the surface *extended down vertically or which* "*have been therein discovered or developed.*" The ores taken by the defendant and for which suit was brought were therefore distinctly excepted from the patent under which the plaintiff claimed. The Court could not in that state of the case have rendered any other judgment.

The next series of errors on which the objections are to the rulings in the admission and exclusion of testimony includes assignments numbered: the "First" being exception to admission of notice of Last Chance Location, as shown by copy ordering a survey from the U. S. Surveyor General's office. Third: The admission of defendant's Exhibit No. 8 (copy of Last Chance location notice). Fourth: The admission of the Duplicate Receipt (Exhibit 9). Fifth: The admission of defendant's Exhibit No. 10 (Register's Final Certificate of Entry in the U. S. Land Office, Transcript pp. 228, 229, 230, 231). These rulings are all objected to for common reasons applicable to all, and we present them together.

No doubt the first reply to our objection will be that the plaintiff was permitted to introduce its location notice, its duplicate receipt and final certificate of entry in the United States Land Office, all of like chararcter with these proofs of the defendants, over the defendant's objection, and that it would have been inconsistent in the Court to admit the same class of proofs for plaintiff and deny them to defendant. While we deny the soundness of that reasoning, we call attention to the different conditions, under which the plaintiff's proofs of this kind were admitted. By referring to the evidence contained in the bill of exceptions it will be seen that the plaintiff introduced by the witnesses Devine and Tyler, evidence to show the discovery of the Tyler lode on the ground; its location, marking of the corners and lines, posting of the notice and filing for record in the proper office. We laid the proper and essential foundation for proofs of this character and then introduced a copy properly certified, from the Recorder's office, of the original notice of location. Then we introduced a certified copy of our application for patent, with proofs of all proceedings connected with the same, and then followed them with our duplicate receipt for money paid to the United States and the final certificate of entry of the Tyler claim. (Trans. pp. 54 to 88.) Then the proper foundation was laid first by proving a lawful location, followed by all the necessary steps to secure a title according to law, ending in payment of the price and a certificate of entry.

The defendant, the Last Chance Company, in order to avoid the duty of showing or proving that it had ever made

a location by proving the fact of discovering a lode, staking the ground and doing the necessary work, involving the *date* at which all of this was done, and the fact of a mineral discovery, was allowed to introduce its notice of location, its duplicate receipt and final certificate of entry at the Land Office, *without any of these necessary preliminary proofs.*

There was not a particle of proof of the discovery of the lode, of the marking out of the claim or indeed any proof of their having ever been a lawful location at any time, except as these things are to be inferred from evidence which we insist was inadmissible until these facts were first proved.

The defendant was allowed *to assume* that a lode had been discovered, that its claim had been located and marked, and all at a particular date, without any proof to establish the fact; and it went further, and claimed that these essential preliminary proofs were to be taken for granted, and not required of it all. And no such evidence was submitted at any stage of the case. When a patent has been issued it is true that it imports that all the acts to establish a valid mining claim have been performed, but until that has been secured, the title rests in the fact being established that the mining law has been complied with. The legal title is in the United States, and the equity is in the locator, which is equivalent to title for all purposes of redress, defense must be made out by proof.

Now, the object of all this line of defense on the part of the defendant is apparent. It was well known that the plaintiff was prepared to show that the Last Chance Location was not in fact made until after the Tyler. That when it was made it was done without any mineral discovery, and that the actual discovery of mineral was long subsequent both to the posting of the notice, and its recording, and that the claim which was marked on the ground, was, with the exception of about 120 feet of its westerly end, entirely different ground from that now included in the present Last Chance location, and that the notice which was recorded as having been made and posted on a location of date Sept. 19th, was in fact written in the town of Murray, 40 miles distant, on the 22d day of that month and

antedated. To avoid exposure of these facts which we offered to prove (See Trans. pp. 299, 300, *et seq.*), the defendant introduced three exhibits and they were admitted against our objection. To entitle a locator to hold mining ground he must show that he has complied with the conditions of the mining law.

McKinstry v. Clark, 4th Mont., 395.
Noyes v. Black, 4th Mont., 527.
Horswell v. King, 7th Pac., 197.
Garfield v. Hammer et al., 8th Pac., 153.
Belke v. Meagher, 104 U. S. Rep., 279.
Gregory v. Pershbaker, 14th Pac., 401.
Duprat v. James, 65th Cal., 555.
Gleason v. Martin White Co., 9 Nor. W. Rep., 435.
Sweet v. , 7 Col., 443.
Lelande v. McDonald et al., 13 Pac., 349.

As part of this series of errors which we assign, we may mention that the record shows that the preliminary affidavit required by the State of Idaho to entitle the notice to be recorded (Exhibit No. 8), was wanting, and that we made the specific objection to its introduction on the ground that there was no proof of its ever having been posted. The Court overruled the objection to its introduction, and then refused to allow us to show that it was not posted as of its date, or any right to contradict the facts which these exhibits tended by inference to prove. There can be but one theory to support these rulings, that is, that the exhibits are regarded of such a high nature as evidence that their effect cannot be controverted, a proposition, that cannot on reflection, it seems to us, be maintained. A patent fair on its face cannot be controverted, except in a special proceeding; but that a location notice is of such monumental verity that it cannot be disputed or the facts which it imports, to wit: that a claim has been located, cannot be seriously urged.

We may not perhaps dispute that a party has paid his money for a mining claim as shown by his receipt from the Land Office, but we may show that he had no such claim. We may not dispute that a certificate of entry has been issued to him as shown by the certificate, but we may dispute that he had any location upon which to make this entry.

This giving the force of a judgment to a mere ministerial act, which to have any efficacy, must have been upon certain precedent facts, is without any judicial sanction to our knowledge. To make these *exparte* proceedings conclusive, they must have ripened into a patent. Until that stage of the case has arrived they are neither regarded by the executive nor the judicial departments as having any force beyond being steps in the pursuit of a title.

These rulings put this case in this shape: The defendant, the Last Chance Mining Co., claims that it is the owner of certain mining ground. The evidence it introduces to establish its claims, a copy of notice of location, a judgment record that it is the owner of a piece of ground comprising about one acre of land in the limits of its claim, a receipt from the U. S. Land Office for the money price of its entire claim, and a final certificate of entry of a certain parcel of ground.

There is no proof of location or marking on the ground, no proof of a mineral discovery, or a performance of the work required to make a valid location, no affidavit to the location notice, required by law, to initiate a lawful claim; and in fact a total absence of all proof required to establish a location right to the claim. And in order that the defendant may stand iron-clad against all attack before the jury, the Court, after permitting these proofs to be made in this form, held that we may not contradict the inferences which it draws as a matter of law from them. An offer to prove that the notice was not posted until after the Tyler location was made; that at the time it was posted no discovery of mineral had been made; that the claim was not marked on the ground as required by law; all this evidence was regarded as "immaterial and incompetent." The Court ruled in substance that you have, by allowing the Last Chance Mining Company to have the ground which you abandoned, to the extent of an acre, given it full protection to all of its ground, and you cannot dispute it. Because we did not contend over a little worthless strip of barren ground, and abandoned it, we are held to have acknowledged that our antagonist owned all it now seeks to claim. The statement of the proposition is its own refutation. We

have now discussed all the questions raised on the 1st, 3d, 4th, 5th, 6th, 8th, 9th, 10th, 11th and 12th assignments.

The questions raised by the second and seventh assignments of error have also been considered. The errors assigned as the 13th to the 36th for refusing instructions asked by the plaintiff are covered by the argument already made.

We come now to the 36th assignment of error. We asked the Court to instruct the jury as follows:

"If the jury find that each of the defendants, the Last "Chance Mining Company, the Republican Mining Com- "pany, and the Idaho Mining Company, have severally "entered upon the surface of the ground underneath which "a vein belonging to the plaintiff descends in its downward "course, and that each of said defendants claim a portion "of said vein adversely to plaintiff, and have worked it "together by a common agent; then the plaintiff is entitled "to recover against said three defendants jointly, and also "against the other defendants in possession adversely to "plaintiff, provided, under the other instructions, you find "plaintiff entitled to recover at all."

"The plaintiff is entitled to recover against all defen- "dants who have filed a disclaimer, as such disclaimer is an "admission of plaintiff's right."

The condition of the case was this:

The proof was that Charles Sweeney was the common manager and agent of three mining companies known as the Last Chance Mining Company, the Republican Mining Company, and the Idaho Mining Company, and that Frank R. Moore was the president of each of the companies, and that all the work was done through openings on the Last Chance claim, and that they were working together in one combination. The Last Chance Company first paying all the bills and then charging each of the other companies with whatever share it shall properly bear. Under these circumstances they were joint trespassers and each and all liable; the Last Chance, by reason of its performing the forbidden

acts, the others by sharing in and accepting the results of these acts.

The correctness of this instruction under the facts we think unquestionable.

1 Sutherland on Damages, 211, *et seq.*
Williams v. Sheldon, 10th Wend., 654.
Guike v. Swan, 19th Johns., 381.

The injury worked to us by the failure to give them is manifest, not so much in the findings made by the jury as in the subssquent action of the Court. It refused to enter judgment on the verdict as returned, but set it aside in part, allowing costs to the defendant, the Last Chance Company, the party that admittedly had been guilty of the trespass, and costs to the plaintiff against the other two companies. If this case is to be retried we think this error ought to be corrected so that it may not be repeated. If we shall prevail against any one of these parties, and it is clear we must as to two of them, we are entitled to a judgment against all who engaged in the trespass, both for damages and costs. The proposition in a law case to apportion damages and costs among joint trespassers is not justified by any rule or statute known to us.

We now come to the exceptions noted to the charge as given by the Court. To portions of the first and second instructions these exceptions are specific, The Court by these instructions put the question as to which was the prior location beyond the reach of the jury, and then perpetrated the error on that subject, of which we have already made complaint, although the evidence before the jury which showed our location both as to the date and compliance with the mining law, was, in the absence of any other testimony on that subject, sufficient to require a finding in our favor.

We had asked the Court to instruct the Jury that the relative *dates of entry* of the Last Chance and Tyler claims show that the Tyler was prior to the Last Chance, and in the absence of the testimony showing the exact date of location, priority of entry would give priority of title. (Seventeenth prayer.)

As the Court had, by its rulings, indicated that it treated a final certificate of entry as conclusive evidence of the title of the party holding it, to the land it embraced, we adopted the Court's own theory, and asked the benefit of the presumption which attaches to such evidence—that he is first in right, who is prior in time. But the Court, unwilling to accept its own logic, refused it.

It is the admitted law that a prior patent will hold as against a junior one, unless there is evidence to control it, and if a certificate of entry was to have the same effect as if it was a patent, we were entitled to the benefit of the rule.

We think the Court in applying the rule of conclusive effect to these certificates of entry erred, but if the Court was correct in doing so, it was wholly illogical in refusing the consequences of the rule; both rulings cannot be upheld.

The real error of the Court in the instruction it gave, and in refusing the requests made by us, consisted in its having put the two parties, the Tyler and the Last Chance companies on an equality because each held a certificate of final entry.

We had offered our final certificate of entry at the U. S. Land Office and it had been received. The Court below without requiring any preliminary proof of location, marking of boundaries, mineral discovery, or recording proof which we had strictly and carefully made, admitted the defendant's certificate and gave it the same effect as if such proof had been made. It overlooked the wide difference in the state of the proof made by us and by our opponents, and placed both on a seeming equality of rights, when the burdens which each had carried to arrive at that point, was grevious to us but nothing to them. The rule that he who comes into the vineyard at the eleventh hour shall receive the same reward as he who comes at the sixth, may be good scripture, but it is not yet recognized by the Courts. To assume that the Last Chance location was the oldest without proof that it was ever in fact located at all, while excluding all evidence to overthrow this violent assumption, is to twist the law, not to apply it.

But the real sin of these two instructions consists in their being so given, as to not only fail to give the law applicable to the facts before them, but to make it impossible to follow the instructions. The instructions say that each of the two claimants (Tyler and Last Chance), have introduced such evidence of their titles to their respective locations as to show "each entitled to the surface "ground of their respective claims, and also to all ores "within such surface ground contained, until otherwise "shown, and to any lode the apex of which is found within "the vertically extended planes of the boundary lines of "the claims, with the right to follow it in its downward "course to any depth."

It was admitted by both parties that there was but one lode; both parties admitted that the ground of the other contained the apex of part of the lode, and the matter in dispute was whether the Tyler could follow that portion of the vein which had its apex in Tyler ground, and in its descent passed on its dip under the surface of the Last Chance, and these instructions say that both own it.

The instruction says: "Each is entitled to all ores "within such surface contained, and to any ledge the apex "of which is found within the vertically extended planes of "the boundary lines of the claims, with the right to follow "it to any depth."

And the vertically extended planes of the Tyler end lines cut through the surface boundaries of the Last Chance and extending them vertically cut them off—this would give the Tyler all the ores in the vein which we traced from its apex into the Tyler works; and the same instruction gave the Last Chance Company the ores because it gave it all the ores under its surface ground bounded by vertical lines. As stated above, such an instruction tells the jury to give the lode to both of these parties. It would be impossible to follow it because it was so constructed that upon the facts both of the parties had a perfect title.

The 40th and 41st assignments have already been argued in connection with the exceptions to the refusal of the Court to grant requests on the same subjects, so we pass them over with that argument.

The Court in its fourth instruction gave the law to the jury, as we understand it, with the remark which we have quoted in our 41st exception, as follows:

"Unless it comes in conflict with some prior locator who "had also located a claim in such a manner as the law will "justify."

Is there in fact any such qualification in the law as this instruction states, if so, where?

The language of Sec. 2322 (Rev. Statutes of the United States) is:

"The locators of all mining locations shall have the "exclusive right of possession and enjoyment of all the "surface included within the lines of their locations, and of "all veins, lodes, or ledges, throughout their entire depth, "the top or apex of which lies inside such surface lines "extended downward vertically, although such veins, lodes "or ledges depart from a perpendicular in their course "downward as to extend outside the vertical side lines of "such surface locations."

Mr. Justice Knowles, in the case of the *Montana Copper Co. v. Clark*, held that although a lode passed into the patented ground of another from its apex, the holder of the patent was not its owner.

42 *Fed. Rep.*, 626.

This statute is the basis of the grant, and it contains no such exception in favor of a prior locator as this instruction would engraft upon the law.

Sec. 2336 reads: "Where two or more veins intersect or "cross each other priority of title shall govern, * * * and "where two or more veins unite, the oldest or prior location "shall take the vein below the point of union, including "the space of intersection."

If there be any other section of the statute which authorizes an exception in favor of a prior claimant we have not been referred to it.

If a locator has properly located on the lode as the law prescribes, and is following it within the planes of his end lines extended in their own direction, there can be no conflict with a prior locator, because he either has no claim or, the pretended prior locator has none.

This qualification found in this instruction was incited no doubt from some interpretation of the two decisions of the United States Supreme Court, which are found in

118 *U. S.*, p. 203; and
122 *U. S.*, p. 478.

We have already alluded to these cases in a former part of this brief, but we now return to them for the purpose of showing that they afford no justification for the instruction of the Court to which we have excepted.

In the case of the *Iron Silver Mining Company v. Elgin Silver Mining Company*, 118 U. S., 196, the facts are these: The defendant in the original action was the owner of a location which was called the "Stone." Its surface was an irregular figure with a general resemblance to a short horse shoe, the front or toe of which crossed the dip of a lode, the outcrop of which was inside the limits of the circle. In pursuing the lode, which had its outcrop as described, the defendant entered underneath the surface of an adjoining claim called the Gilt Edge on the dip of the lode, and outside the Stone boundaries, and the Gilt Edge owners brought suit for the trespass. Both claims were patented. The Stone claim was in such form as will be seen by the diagram, page 203 of the report, that while it had two ends, these lines being the limits of the claim were nearly at right angles to each other, and to project them in their own direction would have allowed the Stone claim to take in most of the surrounding country; the end lines were not only not parallel, but there was no attempt or approach to parallelism.

The defendant insisted that without having in fact any end lines and crossing a figure with fourteen corners on the surface with its boundaries, it had a location "properly" made and were entitled to follow the lode on its dip. On this predication of facts, the majority of the Court, sustaining the Court below, held that the claim *had no end lines*,

and that under the law end lines were indispensable i order to enable the locator to have the enjoyment of th grant under the surface ground if within. Now apply thi case and its reasoning to our case. We have the apex o the vein in the Tyler ground. Our side lines cover th whole length of our claim, whether it be such a vein as w assert or as the defendants claim. Our end lines ar parallel and nearly at right angles to the general course o the vein.

The two cases no more resemble each other in thei essential elements, than a perfect parallelogram does a hi of potatoes. The objection to the defense proposed by th "Stone" in that case was: "That by reason of the surfac "form or shape of the Stone claim its owners had no rigl "under the laws of the United States, to follow the lod "alleged to exist therein, in its downward course beyon "the lines of the claim." (p. 202.) That was the questio decided by the case. In this case any justification for th qualification that we are entitled to follow our lode unles we "come in conflict with some prior locator, who had als located a claim in such manner as the law will justify."

The question in that case was whether the owners o the Stone claim by reason of having no end lines coul follow the vein beyond its boundaries. The question i that case is one that cannot arise in this, for we only as the right to pursue our lode *within our end lines projected*, proposition conceded in that case. We put out of vie some of the general remarks of the Court, about the diff culty of locating end lines at right angles to the true cours of the vein. No Court has more frequently repudiated th inference that it had decided a particular point, by the us of an illustration, or an argument or some point in hand than that tribunal. So while the judge does in this cas refer to the difficulty of making proper locations, and to possible solution of them, the matters for decision were no of that character. The judge emphasizes the necessity fo end lines; the dissenting judges in that case were of th opinion that *the law would furnish end lines*, and project ther from the extreme points where the outcrop of the lode wa found in the claim. This is the only point decided in th case.

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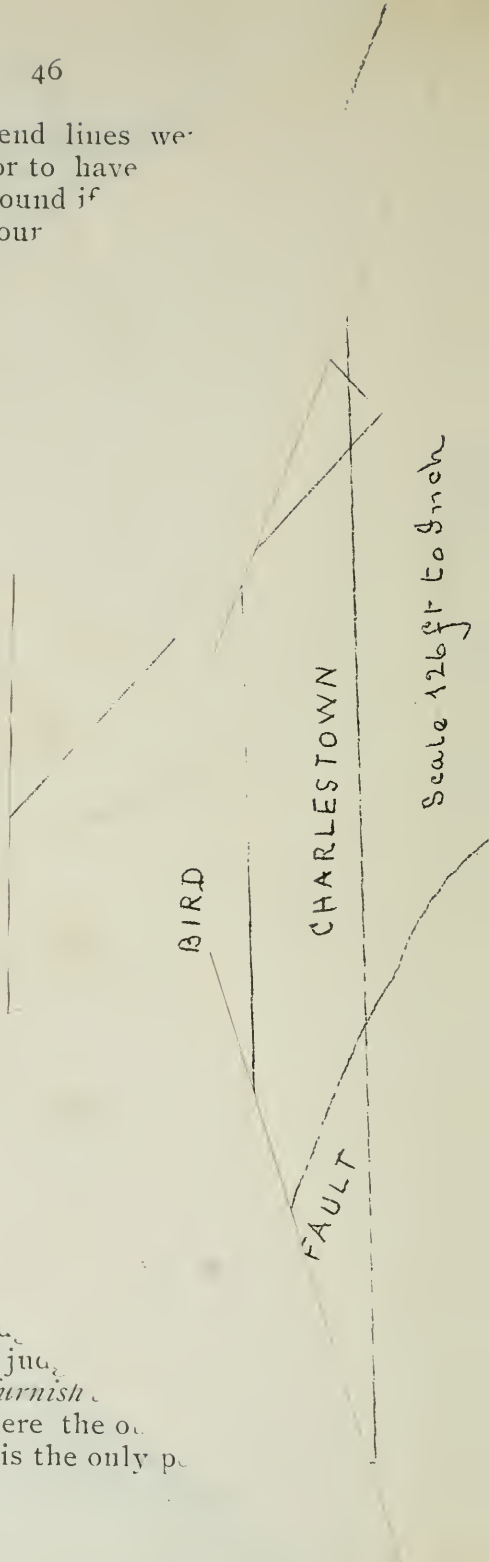
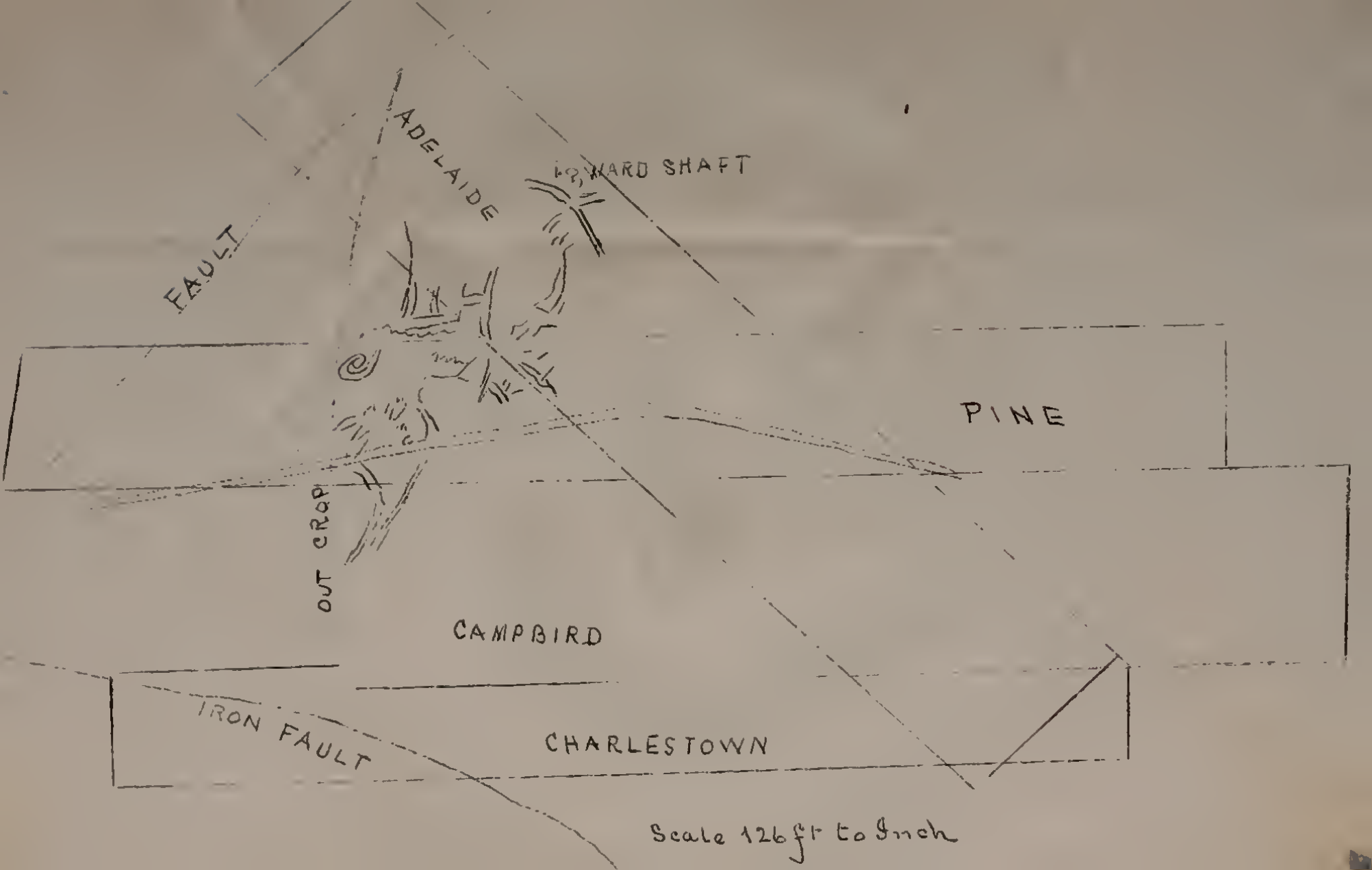


The case of the *Argentine v. Terrible*, 122 U, S., 478, is the one case upon which the defendants have relied, and it is the only one that lends the slightest countenance to the instruction which we are criticising. We have already commented on this case in a former part of this brief, but as it was with a view to the refusal of the Court to give an instruction asked by the plaintiff, and does not cover the question presented here fully, we return again to it.

The annexed diagram shows the relative situations of the opposing claims:

Taking the statement of facts we find that the Adelaide claim under the surface of which the trespass of the defendant had been alleged to be committed, was on the same lode as the Pine, Camp, Bird and Charleston locations were made. That the three claims though located on the apex of the lode were located at right angles to its course, and their side lines instead of being along the lode were in fact their end lines under the ruling in the *Flagstaff* case, and formed the limit of their right to follow the lode on its dip. Even if the dip had been directly towards the Ward shaft in the Adelaide ground, they could not follow it beyond the boundaries of their own end lines. They had cut themselves off by the way their end lines had been laid. Instead of seeking to follow the lode on its dip within their end lines projected, they proposed to go through their own end lines and enter the ground of the Adelaide by working on the strike of the vein instead of the dip. They sought to do precisely what the defendants in our case did do, because the apex of the vein was found in their ground they sought to take ours, *not on the dip from that apex*, but by taking a transverse course partly on the dip and partly on the strike to take ores on the dip of the vein from the Tyler. The case, therefore, instead of being an authority for the defendants in the case at bar is in our favor, because it is a distinct reaffirmation of the *Flagstaff* decision on the general question.

Now the only question in that case that can be tortured into anything favorable to the defendants in the case at bar is the reference made to the priority of the Adelaide. It is easy to see that this was but an incident, and could not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have affected the result. If a party can in no case pass through his own end lines laid by himself, then the Argentine Company could not defend the claim made against them, for it seems that they had passed some hundreds of feet to the east of the end line of their Pine claim and under the surface ground of the Adelaide claim. This fact alone was decisive of the case. Their only defense to the Adelaide claim was that its location shaft was made, not on the apex, but on the flank of the vein; but the Court said that was immaterial, it had made the *first* discovery of *the vein* and that gave a right to all the ground within its limits as against a claim *located as the Pine was.* All the claims involved in the suit — Adelaide, Terrible, on the plaintiff's side; Pine and Camp Bird on the defendant's, were located across the vein, none of them were located along it, the Adelaide more so of all. Under such circumstances the Adelaide could hold all the vein found on its ground, as against a claim that was cut off from it by its own end lines. The matter of priority was only an incident. We think that the equity growing out of a prior appropriation was given an unnecessary prominence in the opinion, because under the peculiar facts it would impress any one as sufficient to determine the case, but on examination it will be seen that in no event, without violating a fundamental rule that had never before been questioned, that the end lines across the lode were a limit beyond which a party could not pass. At the close of the opinion the quotation from the defendants patents shows that the decision could not have been different.

If the Tyler owners were seeking to pass to the northerly of our end line projected, and claiming the right to go outside of the space between its end lines projected in their own direction, then the case would be an authority against us, but as we ask to do what the defendants in the *Argentine* case did without question, until they passed through their end line, pursue this lode on its dip, the entire weight of this case is with us.

It is evident that the Court intended by the instruction which we are now criticising to recognize the right of a locator who had laid his side lines not along the course of the lode, but partially so, to a valid location. That he

was in some way impressed that the opinion of the Supreme Court in the *Argentine* case went so far as to recognize the right of a prior locator, who had laid side his lines across instead of along the lode, *to all that was beneath his surface*, and that the subsequent locator could not enroach upon it, by reason of that priority. Whereas the case only decides that one who locates across the vein cannot go beyond his end lines on the strike, though his neighbor may have located crosswise the vein also. The priority where *neither location is made according to law* is an equity which would protect the older possession. We think if the Court was led to give this instruction by that interpretation of the *Argentine* case it was misled.

The exception to the sixth instruction given by the Court is to that part of the instruction which tells the jury that where the side lines of the location become end lines, by reason of being improperly laid across, instead of along the vein, they become lines between the vertical planes of which he may follow his lode to any depth. We do not assent to this statement of the law.

While the law does not regard trifles and we know any petty deviation from its requirement to locate "on and along the lode" and have end lines cutting the vein at right angles, will be disregarded, and liberally applied in favor of the locator, we think the wide license which this instruction allows becomes a departure from both the letter and spirit of the statute.

The effect of it would be that burdens would follow the location properly made on the lode, which the other would escape. Take the case of a miner where the water level was three hundred feet from the collar of his shaft. If his end lines were properly laid and he sunk his working shaft inside it as a limit in a depth of three hundred feet, he would be compelled to put in a pump. His neighbor locates his end lines at an angle of 44° from a right angle to the course and sinks his shaft along the end line at that angle, he secures by this violation of the law nearly five hundred feet of dry working ground in the vein, and is told it is allowable.

Mr. Morrison, in the last edition of his work on Mining Rights, says substantially:

"We think that the end lines control when at right "angles to the strike or at a less angle; but when at a "greater angle they should be confined to a plane drawn "perpendicular to a line drawn at right angles to the strike. "In other words, that a man cannot take the benefit of any "end line run at such an angle as to claim, when extended "to the dip, ground beyond the surface extent of the end "line."

Morrison Mining Rights, 7th Ed., 115.

GENERAL OBSERVATIONS ON THE QUESTIONS INVOLVED IN THIS CASE.

We feel justified in submitting some general observations upon the principal questions involved in this case.

To the mine owner and the mining lawyer, the important question which this case involves is, when locations are made at every conceivable angle on a lode, either through mistake, carelessness or indifference, what consequences attach thereto? Is the locator who disregards the law to be permitted to deprive the one who has complied with it, by locating on the lode according to law, of rights to which he would otherwise be entitled. The case at bar is an example. The Last Chance Mining Company claims that its Last Chance Mine was located one day earlier than the Tyler. We think the proof in the case shows that the Last Chance is located almost directly across the strike of the lode, and it is in fact admitted by the defendants, while the Tyler was located practically along its course. If the Last Chance had been located according to law, not a pound of the $500,000 worth of ore which its Superintendent testified had been taken out of the Last Chance claim could have been touched by it. Every dollar of that money came out of the vein, the apex of which, found in the Tyler, descends on its dip under the Last Chance surface within the end lines of the Tyler projected in their own direction, and if the Last Chance had been properly located that ore would

be in the Tyler ground or in the Tyler treasury. In other words by *not* locating according to law, the Circuit Court gives to the Last Chance claim ore which would *not belong to it if properly located*, and deprives the Tyler of ores which, being properly located, would belong to it. The innocent and honest locator is made to lose his lode, and the one who has gone in the teeth of the statute is rewarded for the violation, by being given his neighbor's property—the sole reason given for this being that the one claim is prior to the other.

It is not claimed that any case can be found directly adjudging the point, but the refusal of the United States Supreme Court in the Elgin case to *imply end lines when the claim had made no attempt* to produce them, and its refusal to permit the Argentine Company in that case to cross its lines, and extract the ores of one in prior possession, is the basis and sole justification for this anomalous ruling. Perhaps the decision of the Supreme Court of Montana in *King v. Amy Silversmith* may be added to the list.

We have already commented as to the real meaning and gist of the first two decisions, and shown that they cannot be made to do duty in the cause into which they have been pressed. We may add to our former remarks on the Argentine case that Judge Hallett who tried this case in the Circuit Court did not understand he was holding any such position as is now said to be established by that case, for on an application for an injunction on the Leo Lode, he distinctly stated his views in accordance with our position. As we have not commented on the Montana case, we only need say of it, that it seems not to recognize the Argentine or the Elgin cases as having at all decided the point now in issue, and it takes a ground never before held in any case; evidently holding on a basis that end lines in a mining claim are necessary to enable the owner to follow the lode from its apex inside his side lines, into an adjoining claim, and endeavoring to give some effect to the end lines which cross a lode transversely, it constructs new end lines which beginning where the apex of the lode is found, departing from the claim, projects these in the same direction as the surface end lines of the claim on the dip, thus giving to a

claimant the amount of feet on the vein underground, which he has of apex on the surface, but accomplishing it, by taking from the adjoining claimant a portion of the lode which lies beneath the apex in his ground. Could there be a more direct violation of the rule laid down in the most positive terms in the Flagstaff case than this (98 U. S., 463)? "The end lines are to cross the lode and extend perpendicu- "larly downwards and to be continued in their own direction "either way horizontally." In legal language southerly means south, northerly means north, and to cross a lode means to cross it not to cross it in part and split it in part; but to cross it. "* * * The right to follow the dip outside the side lines "is based on the hypothesis that the direction of these lines "corresponds substantially with the course of the lode "or vein." This decision has been repeatedly affirmed by the Supreme Court itself, and followed as the law by all inferior courts without any attempt at criticism or qualification. The Flagstaff location was made under the law of 1866, and was the older of the two locations. The report makes no mention of this as a fact, but as one of the counsel in this case was attorney of the Flagstaff Company in the trial of the case in the District and Supreme Courts of Utah, he knows that the same disclosed the fact. That the question of priority was not distinctly mentioned in the final decision in that case is conclusive that it was not considered as having any bearing on the contest between the parties. The "Titus" had been located "substantially" along the lode, the Flagstaff across the lode, and although the Titus was the junior location, by nearly a year, no effect whatever was given to this fact, but the parties' rights are determined by the other vital question, that one was located along the lode, the other across it. The Argentine case does not modify this decision in this respect, for in that case neither party had located "along the lode" and their rights were therefore properly determined on other considerations.

The only allusion to the question of priority of location in the Flagstaff case is one that is as fatal to the defendants in this case as it was to the defendants in that case. In speaking of the rights of the locator to follow his vein at depth, the Court says: (p. 469.) "Though it should happen "that the locator, by sinking shafts to a considerable depth, "might strike the same vein on its subterranean descent, he

"ought not to interfere with those who, having properly lo-
"cated along the vein are pursuing their right to follow the
"dip in a regular way. So far as he can work upon it and
"not interfere with their right he might probably do so
"(the Argentine is an illustration of such a case) but no
"further. *And this consequence would follow irrespective*
"*of the priority of locations. It would depend on the question*
"*as to what part of the vein the respective locations properly*
"*cover and appropriate.*"

The only allusion to the matter of priority in the entire *Flagstaff* case presents a flat denial of the only proposition upon which the Court in our case based the rights of the Last Chance Company to escape the consequences of taking the ore out of our lode.

The Montana case, *King v. Amy Silversmith*, does not go upon the question of priority, but upon the right of a locator to cut the vein transversely instead of "substantially" across the lode. Whenever there is such a variation from a right angle to the course of the lode in the end lines, then the locator will be held down to a substantial conformity. A slight variation or deviation that worked no substantial injury to his neighbor would be disregarded but to permit a party to draw his end lines in such a direction as to absolutely rob another claimant's claim of a large share of its value would be rewarding a violation of the law, instead of giving protection to one who had made a trifling and innocent mistake. The doctrine of the *Flagstaff* case was first fully stated and upheld in th case of *Kahn v. Old Telegraph M. Co.* 2d Utah. It was again followed in the Supreme Court of that Territory by the *Flagstaff* case, which was affirmed in the United States Supreme Court, and has stood a landmark in the mining law to the present time. The Supreme Court of Nevada in the *Golden Fleece* case adopt the same instruction and in all the mining States and Territories there has been no dissent.

Tombstone Mill and Mining Co. v. Way-up Mining Co., 25 Pac. Rep., 794.

The case of *King v. Amy* in Montana is the only case that in the sightest degree departs from it, and the Court in

that case did so without seeming to be aware of it, for they nowhere express any opinion that they are not in harmony with it.

Against that opinion, which even the judge presiding in our case at bar, only accepted in part, we place the decisions of the Courts in all the other mining States and Territories. To that we should add the almost universal understanding of the legal profession and the mining community. It has been the unquestioned interpretation of the profession taken as a whole any where, that to the extent that a location crosses the apex of a vein the owner is entitled to the lode beneath, *cutting the lode at right angles to its course.* I venture that nine out of every ten mining lawyers have so advised their clients for the last fifteen years. To change that rule now would be to violate what has become a tradition in the mining law.

We have, we think, examined every case in the reports where the application of the mineral law of the United States defining the right of the locator to follow his lode is decided or discussed and we know of none except the cases to which we have referred which can be plausibly claimed as favoring in the remotest degree the doctrine against which we contend in this case. From the pioneer case, that of *Kahn v. Telegraph Co.* in Utah, to the case of the *Montana Copper Co. v. Clark* in the Federal Reporter, they give uniform and we think overwhelming testimony to the view of the law as we ask it.

We submit that on all the grounds assigned our exceptions should be sustained.

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